

DRAFT:WPB:sm (9 Mar 76)

Dear Mr. Chairman:

I am writing to offer our views on H.R. 12048, a bill "Amending Title 5 of the United States Code to improve agency rule-making by expanding the opportunities for public participation, by creating procedures for congressional review of agency rules, and by expanding judicial review, and for other purposes."

Subsections (b) through (e) of section 553 of the Administrative Procedure Act establishes certain procedures to be followed by Federal agencies in ~~substantive~~ ^{rule-making} rule-making. These procedures include advance public notice of rule-making, opportunity to submit views, and delayed effectiveness of rules. Subsection (a) of section 553 makes these procedures inapplicable "to the extent that there is involved a military or foreign affairs function of the United States." H.R. 12048 would amend subsection (a) and exempt instead matters "pertaining to a military or foreign affairs function of the United States that is (A) specifically authorized under criteria established by Executive order to be kept secret in the interest of the national defense or foreign policy and (B) is in fact properly classified pursuant to such Executive order."

The Central Intelligence Agency performs foreign intelligence responsibilities which ^{are protected from public disclosure under} fall within the general exemption for "military or foreign affairs" functions. ^{in existing law} It is our position that foreign intelligence functions

^{proposed would be the case}
Although it is doubted that there is any intent to require public disclosure of foreign intelligence functions, the language of the proposed legislation does raise some question. First, used to argue otherwise. First.

why (public disclosure)

should continue to be entirely excluded from the procedures of section 553. 2

It is not clear that this would be accomplished by the proposed exemption of matters "pertaining to" classified military or foreign affairs functions. The degree of relationship required between the matter involved and a specific classified function is ambiguous. If a direct relationship is contemplated the proposed exemption may not be sufficiently broad to exclude all intelligence matters. In this connection it should be noted that certain intelligence matters not classified pursuant to Executive order are protectible under the statutory authority of the Director of Central Intelligence to protect intelligence sources and methods from unauthorized disclosure. (50 U.S.C. 403)

*3/20/77
Sec
Agmt
Cont*

The policies favoring public participation in rule-making are outweighed by the consequences of subjecting foreign intelligence matters to the requirements of section 553. The traditional reasons for encouraging public participation do not apply in this sensitive area. Rules involving foreign intelligence functions are likely to be so limited in application and have such a minimum public impact, that solicitation of public comment would be senseless as well as fruitless. Moreover, public participation in rule-making concerning intelligence matters is unlikely to make a significant or positive contribution. Thus, society's interest in involving affected members of the public in administrative rule-making is very slight in the foreign intelligence realm. *affairs matters.*

Conversely, the public's interest in the discrete, effective and expeditious performance of the foreign intelligence function militates against applying

publishing disclosure
for foreign intelligence area
these participatory procedures in so vital and sensitive an area. Finally,
Personnel should be advised of question raised
it is questionable whether Congress may constitutionally impose procedural
requirements of its choosing on the President in the performance of certain
duties committed to his office. It is believed that foreign intelligence
functions lie within this zone of special competence.

For the foregoing reasons, this Agency ~~recommends against~~ *opposes* favorable
consideration of H.R. 12048.

The Office of Management and Budget has advised there is no objection
to the submission of this report from the standpoint of the Administration's
program.

Sincerely,

George Bush
Director